

No. 14091

United States
Court of Appeals
for the Ninth Circuit.

PEDRO DIAZ-MONTERO,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of
the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

DEC 4 1953

PAUL P. O'BRIEN



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United States
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for the Ninth Circuit.

PEDRO DIAZ-MONTERO,

Appellant,

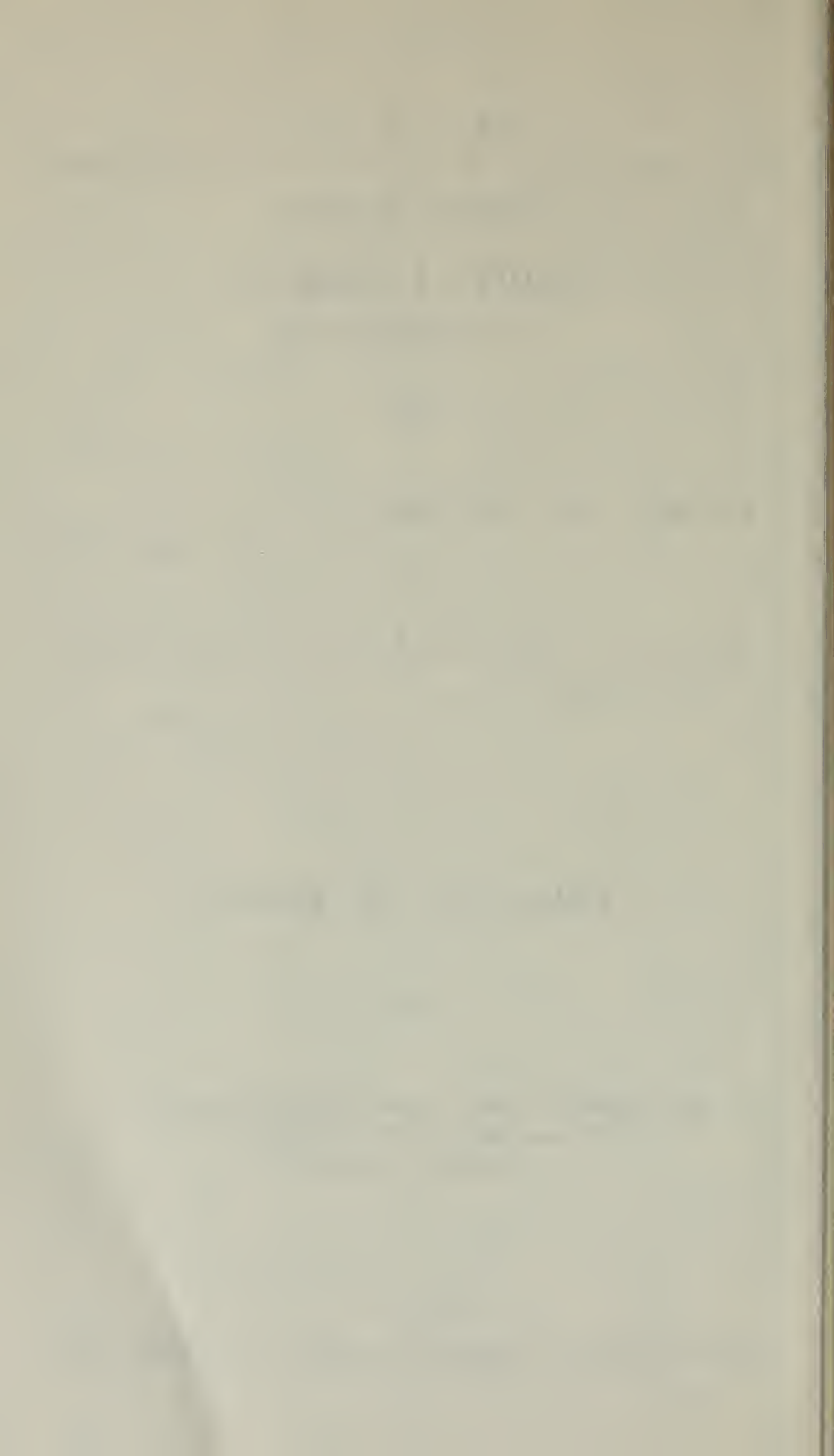
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

MR. EDWARDS E. MERGES,
Attorney for Appellant,
1510 Smith Tower,
Seattle 4, Washington.

MR. CHARLES P. MORIARTY, and
MR. JOHN E. BELCHER,
Attorneys for Appellee,
1017 U. S. Court House,
Seattle 4, Washington.

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In the United States District Court for the Western
District of Washington, Northern Division

No. 3208

PEDRO DIAZ-MONTERO,

Petitioner,

vs.

JAMES P. McGRANERY, Attorney General of the
United States,

Respondent.

PETITION

Comes Now the petitioner, Pedro Diaz-Montero,
and petitioning the Honorable Court for relief
against the respondent, alleges as follows:

I.

That the petitioner is a resident of Seattle, King
County, Washington, within the Western District
of Washington, Northern Division, and brings this
action under the "Declaratory Judgment Act," 28
U.S.C.A. Sec. 2201.

II.

That the respondent is the duly appointed, acting
and qualified Attorney General of the United States
with official residence in Washington, D. C.

III.

That the petitioner is forty-seven years of age,
single and a citizen of Mexico, and last entered the
United States at El Paso, Texas, on June 29, 1943,

at which time he was legally admitted as an agricultural contract laborer and that the petitioner has resided in the United States continuously since that time.

IV.

That in August of 1951, the petitioner was accused by the defendant, through the immigration officers at the Port of Seattle, of having had an adulterous relationship with an American citizen. That said relationship was admitted by the petitioner but that petitioner appealed to the respondent for a suspension of deportation under Title 8, Sec. 155 c., providing for suspension of deportation for an alien who has resided continuously in the United States for seven years or more, and that said application for suspension of deportation was appealed to the Commissioner of Immigration who ordered the petitioner deported from the United States on the warrant of arrest issued by the Immigration Service, and that thereafter such decision of the Commisisoner was affirmed by the Board of Immigration Appeals but that in its opinion the Board of Immigration Appeals found that "except for this affair the alien's character and reputation appears to be excellent. We do not believe that this single lapse should preclude us from making a finding of good moral character."

V.

That in spite of the finding of good moral character made by the Board of Immigration Appeals in the manner set forth above said Board neverthe-

less refused to grant the petitioner the privilege of suspension of deportation and authorized voluntary departure, but, provided that in the event the petitioner does not depart from the United States the order of deportation should be reinstated and executed.

VI.

That by reason of the premises and by reason of the fact that the petitioner has been specifically found to be a person of good moral character and by reason of the further fact that he has undisputedly resided in the United States for seven years and more and was so residing upon the effective date of the Act, the petitioner is entitled to have his deportation suspended, and that the act of the defendant in refusing to suspend the petitioner's deportation and in giving no reasons for its order is arbitrary and unfair, and that petitioner has been denied substantial justice by reason of the same and that the respondent has abused his discretion and that petitioner is entitled to a judgment and decree herein, suspending his deportation, or in the alternative, the respondent should be by the court ordered and directed to suspend the petitioner's deportation or accord him a fair hearing upon the same and that petitioner has no other remedy except this action.

Wherefore, petitioner prays for judgment, suspending his deportation, or in the alternative, that the respondent be required to suspend petitioner's deportation or accord him a further hearing upon the same and to deal otherwise justly and fairly with the petitioner, and petitioner further prays for

such other relief as may be just and fair in the premises.

EDWARDS E. MERGES,
ROY E. JACKSON,

/s/ EDWARDS E. MERGES,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed September 22, 1952.

[Title of District Court and Cause.]

ANSWER

For answer to the petition herein the respondent states:

First Defense

The court does not have jurisdiction over the person of the defendant, James P. McGranery, Attorney General of the United States, who resides in Washington, D. C.

Second Defense

The petition fails to state a claim upon which relief can be granted.

Third Defense

Answering the numbered paragraphs of the petition respondent states:

The allegations of paragraphs I, II, III, IV and V are admitted.

The allegations of paragraph VI are denied.

For further answer the respondent states:

I.

The petitioner last entered the United States at the port of El Paso, Texas, on June 29, 1943, and was admitted temporarily as an agricultural contract laborer for one year. The petitioner abandoned his contract employment during October, 1943, and has since resided in the United States. A warrant of arrest was issued by the District Director, Immigration and Naturalization Service, Seattle, January 9, 1951, alleging that the petitioner was deportable in that he failed to depart from the United States in accordance with the terms of his admission.

II.

A deportation hearing was accorded the petitioner November 30, 1951, at Seattle, at which time he was represented by counsel. During the course of said hearing the petitioner admitted that he was deportable under the immigration laws but applied for suspension of deportation under the provisions of Section 19(c)(2) of the Immigration Act of 1917, as amended (8 U.S.C. 155(c)). Evidence was taken with respect to his eligibility for such discretionary relief.

III.

On December 7, 1951, the hearing officer recommended that suspension of deportation be denied and further ordered that the alien be deported from the United States pursuant to law. The petitioner appealed to the Commissioner, Immigration and Naturalization Service, and on February 21, 1952, the Commissioner adopted the findings of the hear-

ing officer, stating that as a matter of administrative discretion, the facts and circumstances in his case do not warrant the exercise of any discretionary relief and ordered that the petitioner be deported.

IV.

The petitioner appealed from the decision of the Commissioner to the Board of Immigration Appeals and on May 1, 1952, the Board of Immigration Appeals, exercising the discretion vested in the Attorney General by law, denied the application for suspension of deportation and, in the alternative, exercised the discretion of the Attorney General by authorizing voluntary departure for the petitioner within the period of sixty days. The Board further ordered that in the event the petitioner did not depart from the United States within sixty days that the order of deportation be reinstated.

V.

A petition for reconsideration was directed to the Board of Immigration Appeals by the petitioner July 7, 1952. On August 11, 1952, the Board denied the motion to reconsider.

Wherefore it is prayed that petition for a declaratory judgment and other relief be denied.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

Service of copy acknowledged.

[Endorsed]: Filed November 12, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant and moves the court to dismiss the petition herein in that the court does not have jurisdiction to review an order of deportation in an action for a declaratory judgment under 28 U.S.C.A., Section 2201.

Heikkela v. Barber

345 U.S. 1 (March 16, 1953).

Respectfully submitted,

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ JOHN E. BELCHER,

Asst. United States Attorney.

[Endorsed]: Filed March 25, 1953.

[Title of District Court and Cause.]

STIPULATION FOR CHANGE OF
RESPONDENT

By reason of the fact that the respondent James P. McGranery, has been replaced as Attorney General by Herbert Brownell, it is Hereby Agreed and Stipulated by and between the attorneys for the

petitioner and the respondent hereto that an order be entered substituting Herbert Brownell as Attorney General for James P. McGranery, former Attorney General.

/s/ EDWARDS E. MERGES,
Attorney for Petitioner.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

ORDER

This Matter having come on regularly to be heard before the undersigned Judge of the above-entitled court and it appearing to the Court from the above stipulation that the respondent, James P. McGranery, is no longer Attorney General, and that Herbert Brownell is now the duly appointed Attorney General and that he should be substituted as respondent in the above-entitled cause by reason of such appointment, now, therefore, it is hereby

Ordered, Adjudged and Decreed that Herbert Brownell be and he hereby is substituted as respondent in the above-entitled cause and that all pleadings hereinafter filed herein shall bear his name as respondent, and that in all other ways the status of said cause shall remain the same and be unaffected hereby.

Done in Open Court this 4th day of May, 1953.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ EDWARDS E. MERGES,
Attorney for Petitioner.

Approved as to form and entry:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed May 4, 1953.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 3208

PEDRO DIAZ-MONTERO,

Petitioner,

vs.

HERBERT BROWNELL, Attorney General of the
United States,

Respondent.

ORDER OF DISMISSAL

This Matter having come on regularly to be heard before the undersigned Judge of the above-entitled court upon the motion of the respondent herein to dismiss, and it appearing to the court that the petition herein was filed on or about the 22nd day of September, 1952, and that thereafter the respondent appearing on or about the 10th day of November, 1952, and filed his answer herein; that thereafter in March of 1953, the respondent filed "A Motion to Dismiss" which said motion was argued to the court and the court having listened fully to the arguments of counsel and having considered the matter, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the respondent's motion to dismiss should be and it hereby is granted. It is further

Ordered, Adjudged and Decreed that the above-entitled cause should be and it hereby is dismissed on the ground that the complaint fails to state a claim upon which relief can be granted, and judgment should be and it hereby is rendered in favor

of the respondent and against the petitioner on the authority of *Heikkila v. Barber*, 345 U.S. 1, S.C.R. Vol. 73, No. 11, p. 603.

Done in Open Court this 3rd day of August, 1953.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

Approved as to form and entry:

/s/ EDWARDS E. MERGES,
Attorney for Petitioner.

[Endorsed]: Filed and entered August 3, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the petitioner, Pedro Diaz-Montero, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal entered herein on the 3rd day of August, 1953, and from each and every other oral decision and ruling made by the District Court during the pendency of the above-entitled cause.

Dated this 21st day of September, 1953.

EDWARDS E. MERGES,
ROY E. JACKSON,

/s/ EDWARDS E. MERGES,
Attorneys for Petitioner.

[Endorsed]: Filed September 21, 1953.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents: That we, Pedro Diaz-Montero, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Illinois, as surety, are held and affirmatively bound unto the United States of America, in the full and just sum of \$250.00, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Executed this 28th day of September, 1953.

The condition of this application is such that:

Whereas, on the 3rd day of August, 1953, in the above-entitled cause an order was entered dismissing principal's petition to suspend deportation, and the said principal has appealed to the United States Court of Appeals, Ninth Circuit.

Now, Therefore, if the said Continental Casualty Company shall pay or cause to be paid such costs and charges as may be awarded against the principal by judgment, or in the progress of the action, not exceeding the sum of Two Hundred Fifty and

No/100 Dollars, Then This Obligation to Be Void:
otherwise to remain in full force and effect.

PEDRO DIAZ-MONTERO,

By /s/ EDWARDS E. MERGES,
His Attorney.

[Seal] CONTINENTAL CASUALTY
COMPANY,

By /s/ W. H. HICKS,
Attorney-in-Fact.

[Endorsed]: Filed September 29, 1953.

[Title of District Court and Cause.]

PETITIONER'S STATEMENT OF
POINTS ON APPEAL

The District Court Erred in:

1. Granting the respondent's motion to dismiss the petitioner's petition.
2. Ordering that the petition be dismissed on the ground that the petition failed to state a claim upon which relief could be granted.
3. Rendering judgment in favor of the respondent and against the petitioner.
4. Rendering judgment in favor of the respondent and against the petitioner on a basis of the

allegations appearing in the petition without having heard the evidence in support thereof.

EDWARDS E. MERGES,

ROY E. JACKSON,

/s/ EDWARDS E. MERGES,

Attorneys for Petitioner.

[Endorsed]: Filed September 29, 1953.

[Title of District Court and Cause.]

STIPULATION TRANSFERRING
EXHIBITS

It Is Hereby Agreed and Stipulated by and between the parties herein through their respective counsel of record, as follows, to wit:

That the petitioner has filed herein a Notice of Appeal from the Order of Dismissal entered herein on the 3rd day of August, 1953, and has designated the complete record on appeal and that it is necessary in order to complete the record that the original exhibits introduced by the parties be, by order of this court, transferred with the transcript on appeal to the United States Court of Appeals for the Ninth Circuit.

Accordingly, It Is Agreed and Stipulated between the parties that the attached order directing that said original exhibits be transferred by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit be entered forthwith and without notice.

Dated at Seattle, Washington, this 29th day of September, 1953.

EDWARDS E. MERGES,
ROY E. JACKSON,

/s/ EDWARDS E. MERGES,
Attorneys for Petitioner,
Attorneys for Petitioner.
Asst. United States Attorney.

[Endorsed]: Filed September 30, 1953.

[Title of District Court and Cause.]

ORDER TRANSFERRING EXHIBITS

Pursuant to the attached stipulation, It Is Ordered that all original exhibits introduced by either of the parties, or both, be transferred by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit as a part of the transcript on appeal.

Done in Open Court this 30th day of September, 1953.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by.

/s/ EDWARDS E. MERGES,
Attorney for Petitioner.

By MR. BELCHER. W.J.L.

Approved as to form and entry:

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed September 30, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original documents and papers in the file dealing with the above-entitled action as the record on appeal herein (no exhibits having been offered or admitted), from the Order of Dismissal filed August 3, 1953, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, said papers being identified as follows:

1. Petition, filed Sept. 22, 1952.
2. Summons with Marshal's Return thereon, filed Sept. 29, 1952.
3. Answer, filed Nov. 12, 1952.
4. Appearance of defendant USA, filed Nov. 12, 1952.
5. Motion to Dismiss, filed Mar. 25, 1953.
6. Notice of hearing above motion, filed Mar. 25, 1953.
7. Stipulation and order for change of respondent, filed May 4, 1953.

8. Memorandum of Authorities, filed May 27, 1953.

9. Notice of hearing Motion to Dismiss, filed June 2, 1953.

10. Petitioner's Memorandum, filed June 17, 1953.

11. Order of Dismissal, filed Aug. 3, 1953.

12. Notice of Appeal, filed Sept. 21, 1953.

13. Bond on Appeal, \$250.00, Con. Cas. Co., filed 9-29-53.

14. Petitioner's Statement of Points on Appeal, filed 9-29-53.

15. Designation of Record on appeal, filed Sept. 29, 1953.

16. Stipulation Transferring Exhibits, filed Sept. 30, 1953.

17. Order Transferring Exhibits, filed Sept. 30, 1953.

(Clerk's note—No exhibits were offered or received.)

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal in this cause, to wit:

Notice of Appeal, \$5.00,

and that said amount has been paid to me by the attorney for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 9th day of October, 1953.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14091. United States Court of Appeals for the Ninth Circuit. Pedro Diaz-Montero, Appellant, vs. Herbert Brownell, Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 23, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.